Supreme Court
FILE

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No.

In the

Supreme Court of the United States

SABAH SHIPYARD SDN. BHD.,

Petitioner,

-versus-

M/V HARBEL TAPPER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this admiralty case, Petitioner respectfully submits that the Fifth Circuit Court of Appeals has misapplied sections of the Harter Act, 46 U.S.C. §§190-196, erroneously applying Section 190 rationale to a case governed by Section 191, which contains drastically different statutory language. In so doing, the Fifth Circuit Court of Appeals created a conflict with the Eleventh Circuit Court of Appeals. This Court has not considered this issue.

The issue is whether Section 191 of the Harter Act, which prohibits any agreement by which the obligation of an ocean carrier to exercise due diligence to make the vessel seaworthy is "lessened, weakened, or avoided," prohibits a carrier from limiting its liability by contract for damage to cargo caused by an unseaworthy vessel to the otherwise inapplicable package limitation contained in the Carriage of Goods by Sea Act, 46 U.S.C. §1300 *et seq.* ("COGSA"), when the carrier failed to exercise such due diligence.

This District Court answered this question in the affirmative and allowed Petitioner a substantial recovery; the Fifth Circuit reversed, allowing the carrier to limit its liability to the COGSA package limitation of $500 per package or customary unit of freight.

PARTIES TO THE PROCEEDINGS

This petition is submitted on behalf of Sabah Shipyard Sdn. Bhd. ("Sabah"), a Malaysian corporation. Sabah is wholly owned by Westmont Industries Berhad, a Malaysian corporation. Sabah does not have any non-wholly owned subsidiaries.

Defendants in this matter are Intermarine, Inc., Industrial Maritime Carriers (Bahamas) Inc., L&C III Ltd., and M/V HARBEL TAPPER.

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OPINIONS BELOW

The decision of the District Court in this matter was reported at *Sabah Shipyard Sdn. Bhd. v. M/V HARBEL TAPPER*, 984 F.Supp. 569 (S.D. Tex. 1997).

The decision of the Fifth Circuit in this matter was reported at *Sabah Shipyard Sdn. Bhd. v. M/V HARBEL TAPPER*, 178 F.3d 400 (5th Cir. 1999).

The order of the Fifth Circuit denying Sabah's petition for rehearing was issued on July 28, 1999, and was reported at *Sabah Shipyard Sdn. Bhd. v. M/V HARBEL TAPPER*, 1999 U.S. App. Lexis 20271 (5th Cir. 1999).

JURISDICTIONAL BASIS

The jurisdictional basis for this petition for a writ of certiorari is 28 U.S.C. 1254 (1), petition for writ of certiorari by a party to a civil case after final judgment of a United States Circuit Court has been rendered. The Fifth Circuit issued its judgment on June 29, 1999, and denied Sabah's petition for rehearing on July 28, 1999.

STATUTES

46 U.S.C. §190:

> It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to

insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

46 U.S.C. §191:

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

46 U.S.C. §1304(5):

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

46 U.S.C. §1311:

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

U.S. Constitution, Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and marine Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court was 28 U.S.C. §1333, a civil case of admiralty jurisdiction.

This case arises from the destruction of a gas turbine (a jet engine used to drive an electrical generator) and related equipment in Singapore **after** discharge from HARBEL TAPPER and before delivery to the consignee, Sabah Shipyard Sdn. Bhd. ("Sabah"). The equipment was damaged after the carriers placed it on a clearly unseaworthy barge without making any effort to determine if the vessel was seaworthy. Sabah is a Malaysian corporation, with a shipyard in Labuan, East Malaysia. *Sabah Shipyard,* 984 F. Supp. at 570. In 1993, Sabah purchased from Westinghouse a W501D5 Econopac, an electrical power generating unit, to be used on a power barge that Sabah was constructing. *Id.*

Through a freight forwarder, Sabah engaged Intermarine Incorporated ("Intermarine"), as agent for Industrial Maritime Carriers (Bahamas) Inc. ("IMB"), to carry the cargo from Houston to Sabah's facility in Labuan, Malaysia. *Id.* On or about December 13, 1993, Sabah signed a booking note with the freight forwarder for carriage of the cargo from Houston to Labuan on a vessel nominated by Intermarine. *Id.* IMB executed a similar booking note with the freight forwarder. *Id.* at 570-71. In the booking note, the carrier purported to incorporate COGSA, including its $500 per customary freight unit or package limitation, into the pre-loading and post-discharge periods to which it statutorily does not apply. The Harter Act, rather than COGSA, does statutorily apply during these periods. 46 U.S.C. §1311.

On December 16, 1993, IMB commenced loading Sabah's cargo on the HARBEL TAPPER. *Sabah Shipyard*, 984 F. Supp. at 570-71. IMB chartered the HARBEL TAPPER from its owner, L&C III Ltd. ("L&C"). *Id.*, at 570. The HARBEL TAPPER sailed from Houston on December 18, 1993. *Id.*

IMB issued three bills of lading, but none was ever given to Sabah. *Id.*, at 571. The bills of lading vary as to discharge ports, naming either Labuan or Singapore, but the HARBEL TAPPER first proceeded to Singapore and discharged four of the heaviest elements of the cargo to a clearly unseaworthy barge. Carriers had intended to transship these four heavy pieces on a vessel with greater crane lifting capacity to be able to discharge them at Labuan, while carrying the remaining 131 pieces of cargo on HARBEL TAPPER to Labuan.

Prior to the arrival of HARBEL TAPPER in Singapore, carrier's Singapore agent arranged for the discharge, storage and oncarriage of the four heavy cargo elements, including the gas turbine. *Id.*, at 572. If the cargo would be stored in Singapore for only a few days, storage on a barge was cheaper than storage on a pier. *Id.* Because the oncarrying vessel would arrive within a few days of the HARBEL TAPPER, carriers arranged for discharge to a barge. *Id.*

The barge was not inspected by carriers or their representative before Sabah's cargo was loaded onto it. *Id.* The barge was obviously unseaworthy. *Id.* After the turbine, weighing 150 tons, and three other items of heavy lift (i.e., more than 25 tons each) equipment were loaded onto the barge, the barge was towed to the Tuas Basin and moored,

unattended, overnight. During the night, the barge apparently flooded and developed a list, and dumped Sabah's turbine and two other heavy lift pieces, the mechanical package and the pipe rack, into the salt water of Singapore harbor. *Id.* The turbine, pipe rack, and mechanical package, which had cost Sabah $13,090,245, were reduced to scrap. The District Court held, *inter alia*, that the carriers had failed to exercise due diligence to provide a seaworthy vessel as they were obligated to do by the Harter Act. *Id.* at 574-75. The District Court denied carrier's attempt to limit its liability and awarded judgment to Sabah in the amount of $7,684,686.97, plus interest for a total of $9,125,565.78, holding that, *inter alia*, the Harter Act invalidated the carriers' attempt to extend the COGSA package limitation contractually into the Harter Act period. *Id.*

Carriers appealed the ruling of the District Court. Sabah cross-appealed regarding an issue of mitigation of damages. On appeal, the Fifth Circuit held, *inter alia*, that the carrier could contractually incorporate COGSA to limit its liability for failure to exercise due diligence to provide a seaworthy vessel despite the Harter Act, 46 U.S.C. §191, prohibition against a carrier including in the contract of carriage any agreement that lessens, weakens or avoids its obligation to exercise due diligence to make the vessel seaworthy. *Sabah Shipyard*, 178 F.3d at 409. Sabah submits this petition for a writ of certiorari on this issue.

ARGUMENT

Sections 190 and 191 of the Harter Act, 46 U.S.C. §190 *et seq.*, contain prohibitions against a carrier's insertion in a contract of carriage certain types of clauses limiting carrier's liability. However, depending on the basis for carrier's liability, these two Harter Act provisions contain drastically different prohibitions. The Eleventh and Fifth Circuit Courts have reached different conclusions on the construction and application of the Harter Act, and there is no United States Supreme Court authority on point.

Where a carrier's liability is based on fault or negligence, the provisions of Section 190 prohibit a carrier from inserting into the contract of carriage clauses to relieve itself of that liability. Cases relied upon by the Fifth Circuit in this matter, *infra*, have concluded that this prohibits a carrier from exonerating itself of all liability, but not from limiting its liability. However, where a carrier's liability is based upon its failure to exercise due diligence to make the carrying vessel seaworthy, Section 191 prohibits any agreement by which this obligation ". . . shall in any wise be lessened, weakened, or avoided". As the Eleventh Circuit held in *Philip Morris, Inc. v. American Shipping Co. Inc.*, 748 F.2d 563 (11th Cir. 1984), *rehearing den.* 753 F.2d 1087 (11th Cir. 1985), the carrier could not limit its liability by contractually extending the COGSA package limitation to the Harter Act period, when Section 191 of the Harter Act was applicable.[1] In this matter, however, the Fifth Circuit held to the contrary.

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[1] In *Philip Morris*, the duty breached was to properly deliver the cargo, which is also an obligation contained in Section 191 of the Harter Act.

The Fifth Circuit in this matter held that nothing in the Harter Act prohibits a carrier from limiting its liability even if the carrier fails to exercise due diligence to make the vessel seaworthy. *Sabah Shipyard*, 178 F.3d at 408-409. The decision of the Fifth Circuit would transform the nondelegable duty of a carrier under the Harter Act to exercise due diligence to make the vessel seaworthy into an optional requirement that may be avoided for $500. The carrier's duty to exercise due diligence to make the vessel seaworthy is one of the carrier's most important duties; the safety of the cargo and life at sea depends upon it. Courts have described this duty as an "absolute duty" (*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960)), a "nondelegable duty" (*Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1329 (5th Cir. 1987)), and a "fundamental" (*Royal Insurance Co. of America v. S/S ROBERT E. LEE*, 756 F.Supp. 757, 760 (S.D.N.Y. 1991)) and "overriding" obligation (*In the Matter of Intercontinental Properties Management, S.A.*, 604 F.2d 254, 261 (4th Cir. 1979)).

In this case, the carriers attempted to limit their liability by contractually extending COGSA and its package limit throughout the period after discharge of the cargo from the HARBEL TAPPER and before delivery to Sabah. COGSA applies statutorily to cargo only when it is onboard the vessel. 46 U.S.C. §1311. The Harter Act, 46 U.S.C. §§190 - 196, applies to carriage of cargo from a U.S. port to a foreign port, *inter alia*, during that period of time between discharge of the cargo from a vessel and delivery of the cargo to the consignee (the "Harter Act Period"). COGSA expressly preserves the applicability of the Harter Act during such period, stating:

> Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

46 U.S.C. §1311.

The parties to a contract of carriage may contractually extend COGSA to include the Harter Act Period. Section 1304(5) of COGSA contains a limitation of a carrier's liability for loss of or damage to goods to $500 per package or the customary freight unit. Sabah contends that contractually incorporating such limitation, where the basis for a carrier's liability is the failure to exercise due diligence to provide a seaworthy vessel, impermissibly conflicts with Section 191 of the Harter Act, which prohibits any clause that may lessen a carrier's obligation to exercise due diligence to make the vessel seaworthy, and is invalid.

Sabah acknowledges that COGSA may be incorporated contractually to apply during the Harter Act Period, and in cases concerning negligence or fault governed by Section 190 rather than Section 191, may even allow a package limitation. However, if Congress had intended the same construction and application of the two sections, it would have used the same words. The cases upon which the Fifth Circuit relied in its holding do not address the obligation to exercise due diligence to make the vessel seaworthy under Section 191 of the Harter Act. See

Commonwealth Petrochemicals Inc. v. S/S PUERTO RICO, 607 F.2d 322 (4th Cir. 1979); *Seguros Illimani S.A. v. M/V POPI P*, 929 F.2d 89 (2d Cir. 1991); *Antilles Insurance Co. v. Transconex, Inc.*, 862 F.2d 391 (1st Cir. 1988), cited at *Sabah Shipyard*, 178 F.3d at 407-8. Instead, the Fifth Circuit focused on negligence cases which appropriately fit under Section 190 of the Harter Act, and which uses drastically different statutory language.

When a carrier's liability is based on negligence or fault, Section 190 prohibits clauses in the contract of carriage under which the carrier would be ". . . **relieved** from liability for loss or damage . . ." (emphasis added). On the other hand, Section 191, in prohibiting the carrier from inserting clauses in regard to its obligation to exercise due diligence to provide a seaworthy vessel, states that such obligation cannot ". . . in any wise be **lessened, weakened**, or **avoided**." (emphasis added). The difference in language in Sections 190 and 191 of the Harter Act indicates that a limitation of liability, which may be valid under Section 190, is not valid under Section 191.[2]

Sabah asserts that contractual provisions, such as the COGSA package limitation, that "lessen[],weaken[] or avoid[]" the carrier's obligation to exercise due diligence to make the vessel seaworthy are invalid under §191. The COGSA limitation of liability has precisely the prohibited effect of lessening the carrier's obligation, and the Fifth

[2] The headings to both Section 190 and Section 191 do use the word "relieving," although in different contextual settings. Even if this language is relevant, which Petitioner submits it is not, this Court has noted that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 529, 61 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947).

Circuit ruling would effectively permit a carrier to opt out of his obligation at a cost of only $500 per package.

If COGSA is applied to limit a carrier's liability for failure to exercise due diligence to make the vessel seaworthy, it would be contrary to the express terms of Section 191 of the Harter Act. In *U.S. v. Ultramar*, 685 F.Supp. 887, 896 (SDNY 1987), *aff'd.* 854 F.2d 1315 (2d Cir. 1988), the Court held that where the Harter Act would ordinarily apply to an event, it forbids and nullifies all contractual terms which broaden a carrier's immunities and defenses beyond those granted by the Act itself. "Because invoking COGSA to limit defendant's duties after discharge to the [lightering vessel] but before delivery to [the ultimate place of delivery] broadens defendant's defenses, it is forbidden by the Harter Act." *Id.* at 896.

The only Circuit Court, other than the Fifth Circuit in this case, that appears to have addressed the distinction between Sections 190 and 191 in determining whether a carrier may limit its liability by contractually incorporating COGSA during the Harter Act period even though it has failed to fulfill its Section 191 obligations, is the Eleventh Circuit. Unlike the Fifth Circuit, the Eleventh Circuit, in *Philip Morris, Inc. v. American Shipping Co., Inc.,* 748 F.2d 563 (11th Cir. 1984), held that a carrier could not limit its liability by the incorporation of COGSA limitations when it had failed to fulfill its obligations to properly deliver the cargo to a fit wharf. In addition to the due diligence requirement, Section 191 of the Harter Act also requires that carrier's obligations ". . . to care for and properly deliver . . ." the cargo not be lessened, weakened or avoided. The Eleventh Circuit therefore found that the contractual incorporation of COGSA limitations to the post-discharge

Harter Act period, where carrier failed to deliver the cargo to a fit wharf, was prohibited by the Harter Act.

As in this case, in *Philip Morris*, the bill of lading contractually extended COGSA to the entire time the cargo was in the possession of the carrier. The Eleventh Circuit held that any such contractual provisions limiting the carrier's liability during the Harter Act period would be strictly construed against the carrier, noting that "limitations on the carrier's liability are inapplicable if damage occurs due to negligence in the proper delivery of the cargo." At 566-67. The Court held that, because the carrier failed to fulfill its Harter Act duties, the carrier could not claim the benefit of the COGSA package limitation:

> To permit [the carrier] the benefit of the $500 limitation, despite the finding of the district court that [the carrier] did not exercise due diligence in preventing damage to the cargo, both before it was loaded onto the vessel and after it arrived in [the discharge port], would immunize the carrier from the adverse consequences of the negligent handling of cargo. *Nemeth v. General Steamship Corp.*, 694 F.2d 609, 613 (9th Cir. 1982) ("to hold [the] liability limitation is absolute, regardless of the carrier's actions, would permit a carrier to violate the terms of the bill of lading at will, knowing that its liability would be limited to $500 per package.").

At 567.

The holding of the Fifth Circuit in this matter is contrary to the holding of the Eleventh Circuit in *Philip Morris*. The varying decisions between the Fifth and Eleventh Circuits will cause confusion among shippers and carriers as to the state of the law. Neither shippers nor carriers can be certain of their obligations or risks under the Harter Act. The contrary holdings of the Fifth and Eleventh Circuits "interfere with the proper harmony and uniformity" of maritime law. *American Dredging Co. v. Miller*, 510 U.S. 443, 451, 114 S.Ct. 981, 127 L.Ed. 285 (1994), citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). Uniformity of maritime law has long been recognized as an overriding principle by this Court. In *American Dredging*, this Court repeated the characterization of the Article III provision extending federal judicial power "to all cases of admiralty and maritime jurisdiction" given in *The Lottawanna*, 88 U.S. 558, 21 Wall. 558, 575, 22 L.Ed. 654 (1875):

> One thing . . . is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

American Dredging, at 451.

Because of the diverging rulings in the Eleventh and Fifth Circuits, and the compelling federal policy of uniformity in maritime law, this Court should grant Sabah's petition for certiorari.

CONCLUSION

Carriers have attempted to lessen their obligation to exercise due diligence to make the vessel seaworthy by contractually extending COGSA throughout the Harter Act Period. The effect of extending the COGSA package limitation, however, is inconsistent with the clear wording of Section 191 of the Harter Act. Therefore, the extension is invalid. Carriers should not be given the benefits of the package limitation because they failed to fulfill their Harter Act duty to exercise due diligence to make the vessel seaworthy. The District Court accepted this and held, *inter alia*, that where a carrier failed to exercise due diligence to make the vessel seaworthy in the Harter Act Period, Section 191 of the Harter Act prohibited the carrier from contractually incorporating a COGSA package limitation. The Fifth Circuit, however, rejected this argument and put itself in conflict with the holding of the Eleventh Circuit in *Philip Morris*.

Sabah respectfully requests that this Court grant its petition for a writ of certiorari to resolve this issue.

Respectfully submitted,
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(Any footnotes trail end of each document)
No. 97-41417, NO. 98-40104

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SABAH SHIPYARD SDN BHD,
Plaintiff - Appellee-Cross-Appellant,

versus

M/V HARBEL TAPPER, IN REM; L & C III LTD; INDUSTRIAL MARITIME CARRIERS (BAHAMAS), INC; INTERMARINE CORPORATED,
Defendants-Appellants-Cross-Appellees-Appellees,

SABAH SHIPYARD SDN BHD,
Plaintiff-Appellant,

versus

M/V HARBEL TAPPER, L & C III LTD; INDUSTRIAL MARITIME (BAHAMAS), INC; ROHDE & LIESENFELD INC; WINDROSE LINE; INTERMARINE INCORPORATED,
Defendants-Appellees.

June 29, 1999, Decided
COUNSEL:
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Botts, Houston, TX. Alfred Edward Yudes, Jr, Jane M Freeberg, Watson Farley & Williams, New York, NY.

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JUDGES:
Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY:
EMILIO M. GARZA

OPINION:

EMILIO M. GARZA, Circuit Judge:
Defendants Industrial Maritime Carriers (Bahamas), Inc. ("IMB"), Intermarine Incorporated ("Intermarine"), and L & C III Ltd. ("L&C"), appeal the district court's judgment. Plaintiff Sabah Shipyard Sdn. Bhd. ("Sabah") cross-appeals. We reverse and remand for further proceedings.

I

Sabah contracted to sell an electrical power generator to the National Power Company of the Philippines (NAPOCOR). Sabah purchased generating equipment, including a gas turbine engine, in the United States. IMB successfully bid for the business of transporting the equipment from Houston, Texas to Sabah's facilities in Labuan, Malaysia. Accordingly, two booking notes were issued. Each provided for shipment of Sabah's equipment from Houston to Labuan via Singapore. IMB, through its agent Intermarine, issued a bill of lading to Sabah's agent (Rohde & Liesenfeld). The bill of lading provided for shipment aboard the M/V Harbel Tapper ("Harbel Tapper"), which L&C owned. The bill listed Houston as the "port of loading," Singapore as the "port of discharge," and Labuan as the "place of delivery by on-carrier."

When the Harbel Tapper arrived in Singapore, the cargo was temporarily discharged to a barge called the Asia Mariner 5. Later, the barge took on water and developed a list, causing several packages--including the turbine--to slide off the barge and into the harbor. After the accident, the turbine was recovered, but it could no longer be used for Sabah's project with NAPOCOR.

II

Sabah filed an action in admiralty against IMB, Intermarine, and L&C (collectively, "the defendants"), arising under general maritime law and the Carriage of Goods by Sea Act ("COGSA"), *46 U.S.C. app. § § 1300*-1315. The defendants answered that, among other things, COGSA limited their liability to $ 500 per package or per unit. See *46 U.S.C. app. § 1304*(5). After a bench trial, the district court issued findings of fact and conclusions of law.

The district court found IMB and Intermarine liable for negligence as forwarders, because they (1) took no measures to determine if the Asia Mariner 5 was seaworthy, and (2) stowed the cargo on a barge that was obviously unseaworthy, too small for the cargo, and unlicensed. See *Sabah Shipyard Sdn. Bhd. v. M/V Harbel Tapper, 984 F. Supp. 569, 574 (S.D. Tex. 1997)*. In the alternative, the district court found IMB and Intermarine liable as carriers under the Harter Act, *46 U.S.C. app. § § 190*-196, because they (1) negligently discharged the cargo to an unseaworthy and unsuitable barge, and (2) failed to exercise due diligence to provide a seaworthy barge. See *Sabah, 984 F. Supp. at 574-75*. The district court also held L&C liable as a carrier under the Harter Act, because it discharged the cargo to an unseaworthy and unsuitable barge. See *id. at 575*.

The district court declined to apply COGSA's $ 500-per-package-or-per-unit limit on liability. As to IMB's and Intermarine's liability as forwarders, the court held that COGSA's $ 500 limit did not apply to forwarders. See *id. at 574*. Regarding the defendants' liability under the Harter Act, the district court held that the Harter Act did not provide any limits on liability and that carriers may not limit their liability

under the Harter Act. See *id. at 575.* Finally, the district court held that, even if COGSA applied, a carrier may not invoke COGSA's $ 500 liability limit if it fails to exercise due diligence to provide a seaworthy vessel. See id.

The district court found actual damages totaling over $ 13 million. See *id. at 573.* However, the court ruled that proper treatment of the salvaged turbine parts would have substantially mitigated Sabah's loss, and it reduced the amount of damages accordingly. See id. The district court also rejected Sabah's argument that Sabah was entitled to additional damages stemming from a liquidated-damages clause in its contract with NAPOCOR. See *id. at 574.*

Based on these findings and conclusions, the district court entered judgment against IMB, Intermarine, and L&C in the amount of $ 9,125,565.78. See *id. at 575.* The defendants timely appealed, and Sabah timely cross-appealed.

III

The defendants argue that the district court erred by denying them the $ 500-per-package-or-per-unit limit on liability afforded to carriers under COGSA.[1] COGSA provides that a carrier shall not be liable,

> "for any loss or damage to or in connection with the transportation of goods in an amount exceeding $ 500 per package . . ., or in the case of goods not shipped in packages, per customary freight unit . . ., unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

46 U.S.C. app. § 1304(5). To take advantage of COGSA's limit on liability, however, the carrier must offer the shipper a "fair opportunity" to declare the true value of the shipment and to pay a correspondingly higher shipping rate. See *Brown & Root v. M/V Peisander, 648 F.2d 415, 424 (5th Cir. 1981); Tessler Bros. (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438, 443 (9th Cir. 1974);* 2A BENEDICT ON ADMIRALTY § 166 at 16-24 to 16-25 (April 1999) ("BENEDICT"). Thus, under COGSA, the $ 500 liability limit applies unless (1) the shipper declares a higher value and pays a higher shipping rate, or (2) the carrier does not give the shipper a fair opportunity to declare a higher value. See *Wuerttembergische & Badische Versicherungs-Aktiengesellschaft v. M/V Stuttgart Express, 711 F.2d 621, 622 (5th Cir. 1983).* It is undisputed that neither Sabah nor its agent declared a higher value for the cargo. Sabah does not contend that the defendants denied it a fair opportunity to declare a higher value.

On appeal, the defendants challenge each of the district court's reasons for not applying COGSA's liability limit. First, IMB and Intermarine argue that the district court erred in holding them liable as forwarders, which are not covered by COGSA. Second, the defendants argue that the Harter Act does not prevent application of the $ 500 liability limit in this case. Third, the defendants argue that COGSA's $ 500 limit applies even to carriers who fail to exercise due diligence to provide a seaworthy vessel.

In admiralty cases tried by the district court without a jury, we review the district court's legal conclusions de novo. See *Nerco Oil & Gas, Inc. v. Otto Candies, Inc., 74 F.3d 667, 668 (5th Cir. 1996).* We review the district court's factual findings under the clearly erroneous standard. See FED. R. CIV. P. 52(a); *Nerco, 74 F.3d at 668.* The clearly erroneous standard

of review does not apply "to decisions made by district court judges when they apply legal principles to essentially undisputed facts." *Walker v. Braus, 995 F.2d 77, 80 (5th Cir. 1993).*

A

We first address whether the district court erred by holding IMB and Intermarine liable as forwarding agents. They contend that under COGSA, they are carriers, and not forwarding agents. Whether IMB and Intermarine are carriers or forwarders is crucial, because COGSA's liability limit applies only to "carriers." *46 U.S.C. app. § 1304*(5); see also *Zajicek v. United Fruit Co., 459 F.2d 395, 402 (5th Cir. 1972)* (holding that the $ 500 limit does not apply to forwarders).

Under COGSA, "the term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper." *46 U.S.C. app. § 1301*(a). A "contract of carriage" is one that is "covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea . . . ." *46 U.S.C. app. § 1301*(b). To determine whether a party is a COGSA carrier, we have followed COGSA's plain language, focusing on whether the party entered into a contract of carriage with a shipper. For example, in *Pacific Employers Ins. Co. v. M/V Gloria, 767 F.2d 229 (5th Cir. 1985),* we reasoned that a party is considered a carrier under COGSA if that party "executed a contract of carriage." *Id. at 234;* see also *Bunge Edible Oil Corp. v. M/VS' Torm Rask & Fort Steele, 949 F.2d 786, 788-89 (5th Cir. 1992)* (finding that no factual issues existed as to carrier status where party demonstrated that it entered into a contract of carriage with a shipper); *Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1370 (5th Cir. 1979)* (finding that a party was a

carrier under COGSA simply because it entered into a contract of carriage with a shipper); *Demsey & Assocs. v. S.S. Sea Star, 461 F.2d 1009, 1014 (2d Cir. 1972)* ; *Trade Arbed, Inc. v. S/S Ellispontos, 482 F. Supp. 991, 994 (S.D. Tex. 1980)* ("One principle emerges clearly: whoever enters the contract of carriage with the shipper in a given transaction comes within the definition of a "carrier" pursuant to Section 1301(a) of COGSA.").

In this case, it is without question that IMB and Intermarine entered into a contract of carriage with Sabah. They agreed to carry Sabah's goods by sea, and they issued a bill of lading. Hence, under the plain language of COGSA and our precedent, IMB and Intermarine are carriers.[2]. As to the second Zima factor, there is no evidence of any history of dealings between the parties.[3] However, Sabah contends that IMB and Intermarine are estopped from claiming that they are not forwarders.[4] Sabah relies on (1) a letter from IMB to Sabah, in which IMB stated that it was acting solely as a forwarding agent after the cargo was discharged from the Harbel Tapper, and (2) Clause 6 of the bill of lading, which provides: "When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only."[5]

Sabah fails to cite any authority that these documents provide a basis for estoppel. Indeed, Sabah fails even to explain what form of estoppel should apply. Neither collateral estoppel, judicial estoppel, nor equitable estoppel apply to the case at hand. Collateral estoppel prevents a party from contesting certain issues that were "previously decided in another proceeding." *Taylor v. Charter Med. Corp., 162 F.3d 827, 832 (5th Cir. 1998).* Whether IMB and Intermarine acted as forwarders was never the subject of any previous proceeding.

Judicial estoppel prevents a party from taking a position "that is contrary to a position previously taken in the same or some earlier proceeding." *Ergo Science, Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996).* Neither the letter nor the bill of lading constitute a position taken in the present or any previous proceeding. A party may only invoke equitable estoppel if it detrimentally relied on the misrepresentations of the other party. See *Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 n.4 (5th Cir. 1990)* (Texas law equitable estoppel); *Oxford Shipping Co. v. New Hampshire Trading Corp., 697 F.2d 1, 4 (1st Cir. 1982)* (equitable estoppel in the context of COGSA). Sabah does not argue that it relied on any representations that IMB and Intermarine acted as forwarders.

IMB and Intermarine are carriers as the term is defined in COGSA, and we reject Sabah's contention that IMB and Intermarine are estopped from disclaiming forwarder status. Accordingly, we find that the district court erred in refusing to apply COGSA's $ 500 liability limit on the ground that IMB and Intermarine acted as forwarders.

B

The defendants also argue that the district court erred in finding that the Harter Act prevented them from invoking COGSA's $ 500 liability limitation. The Harter Act of 1893 was Congress' first attempt to set forth the obligations of maritime carriers. See 2A BENEDICT § 11 at 2-3. The Harter Act defines a carrier's duties with regard to proper loading, stowage, custody, care, and delivery of cargo. See *Metropolitan Wholesale Supply, Inc. v. M/V Royal Rainbow, 12 F.3d 58, 61 (5th Cir. 1994).* In 1936, Congress enacted COGSA, which supersedes much of the Harter Act. See *Tapco Nigeria, Ltd. v. M/V Westwind, 702 F.2d 1252, 1255 (5th Cir. 1983).*

However, COGSA expressly provides that it does not supersede the Harter Act as to "the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship." *46 U.S.C. app. § 1311.* Hence, "COGSA . . . does not apply either before loading or after discharge of the cargo." *Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 483 (2d Cir. 1985)* (citing *46 U.S.C. app. § 1311).* During those periods, the Harter Act governs. See *Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, 739 (4th Cir. 1993); Tapco Nigeria, 702 F.2d at 1255.*

Sabah argues that, because its cargo was damaged after discharge from the Harbel Tapper, the Harter Act governs. Thus, according to Sabah, COGSA's $ 500 liability limit does not apply. The defendants respond that the bill of lading contractually extended COGSA's $ 500 limit to the period after discharge.[6] The bill of lading provides that COGSA shall govern before loading, after discharge, and during the entire time when the cargo is in the carrier's possession.

Sabah does not contest that the bill of lading purports to extend COGSA to the period after discharge. Rather, it asserts that the Harter Act prohibits a carrier from contractually extending COGSA's liability limit to the periods covered by the Harter Act. As support, Sabah cites § § 1 and 2 of the Harter Act. Section 1 of the Harter Act provides that a carrier may not insert any contractual provision under which the carrier is "relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of [its cargo]." *46 U.S.C. app. § 190.* Section 2 of the Harter Act commands that a carrier may not insert any contractual provision that "lessens, weakens, or

avoids" its duty to exercise due diligence to provide a seaworthy vessel or its duty to handle, stow, and deliver its cargo. *46 U.S.C. app. § 191.* Sabah contends that to allow the defendants to contractually extend the COGSA's $ 500 liability limit would run afoul of these Harter Act provisions.

Numerous courts, including our own, have stated that parties may contractually incorporate COGSA's provisions to the periods of a voyage ordinarily covered by the Harter Act. See *Mori Seiki USA, Inc. v. M.V. Alligator Triumph, 990 F.2d 444, 447 (9th Cir. 1993); Insurance Co. of N. Am. v. Puerto Rico Marine Management, Inc., 768 F.2d 470, 475 (1st Cir. 1985); Colgate Palmolive Co. v. S/S Dart Canada, 724 F.2d 313, 315 (2d Cir. 1983); Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc., 562 F.2d 938, 940 n.3 (5th Cir. 1977).*[7] None of these cases, however, expressly discusses whether the Harter Act impacts the parties' ability to extend COGSA to the periods before loading and after discharge.[8] One case in our circuit, however, has examined this issue. See *Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft, 855 F.2d 215, 217 (5th Cir. 1988).* There, we ruled that where the parties contractually extend the provisions of COGSA to the periods covered by the Harter Act, "any inconsistency with the Harter Act must yield to the Harter Act." Id.[9]

Under our precedent, then, the key issue is whether the contractual incorporation of COGSA's $ 500-per-package-or-per-unit limit on liability is inconsistent with the Harter Act. We have not found, nor has Sabah cited, any case holding that COGSA's $ 500 limit is inconsistent with the Harter Act. To the contrary, several courts have upheld the contractual extension of COGSA's $ 500 limit to the periods covered by the Harter Act, despite challenges that

such limits were invalid. For example, the court in *Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico, 607 F.2d 322 (4th Cir. 1979),* enforced a contractual provision that extended COGSA's $ 500 limit, finding that such a provision "is clearly valid under the Harter Act." *Id. at 328.* Likewise, in Seguros "Illimani" *S.A. v. M/V Popi P, 929 F.2d 89, 93-94 (2d Cir. 1991),* the court rejected a shipper's argument that a contractual provision, which made COGSA applicable both to the post-discharge period and to parties other than the carrier, violated public policy. The court held: "Admiralty law, which limits liability to $ 500 per package by statute, certainly permits the contractual extension of COGSA's limitation of liability to cover . . . the post-discharge period." *Id. at 94.*[10]

Cases that address the validity of contractual limits on carrier liability in general are also instructive as to whether such limits are "inconsistent" with the Harter Act. Numerous cases have allowed carriers to contractually limit their liability, provided the shipper has the option to declare a higher value and to pay a correspondingly higher shipping rate. For example, the court in *Antilles Insurance Co. v. Transconex, Inc., 862 F.2d 391 (1st Cir. 1988),* found that the Harter Act did not invalidate a contractual provision that limited the carrier's liability to $ 50 per shipment. See *id. at 393.* Indeed, such provisions were regularly upheld during the years before COGSA's enactment, when the Harter Act was the only federal legislation addressing a carrier's duties. During that period, courts enforced bills of lading that set an agreed valuation for the cargo, above which the carrier would not be held liable unless the shipper declared a higher value in advance. See *Frederick Leyland & Co. v. Hornblower, 256 F. 289, 291-92 (1st Cir. 1919); Hohl v. Norddeutscher Lloyd,*

175 F. 544, 547 (2d Cir. 1910); see also 2A BENEDICT § 12 at 2-5. The Supreme Court wrote:

> Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. The agreement as to value in consideration of carriage at the lower rate thus obtained is held to estop the shipper from demanding damages in excess of the agreed value.

Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 497, 55 S. Ct. 483, 484-85, 79 L. Ed. 1016 (1935) (citations omitted).[11]

Thus we find ample support for the proposition that parties may contractually incorporate COGSA's $ 500 liability limit to the periods of carriage before loading and after discharge. The cases cited by Sabah to the contrary fail to persuade us. In both *Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720 (2d Cir. 1963),* and *United States v. Ultramar Shipping Co., 685 F. Supp. 887 (S.D.N.Y. 1987),* aff'd *854 F.2d 1315 (2d Cir. 1988),* the Second Circuit invalidated contractual provisions that would have completely exonerated the carrier from any liability. See *Caterpillar, 318 F.2d at 723-24; Ultramar, 685 F. Supp. at 896.* In the case at hand, however, the defendants invoke a contractual provision that would merely limit the amount of the carrier's liability. "This distinction between a limitation on liability and an exemption from liability is crucial. A limitation, unlike an exemption, does not induce negligence." *Tessler Bros. (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438, 443 (9th Cir. 1974).*

Sabah also cites *Philip Morris v. American Shipping Co., 748 F.2d 563 (11th Cir. 1984),* as support for the proposition that a carrier may not contractually extend COGSA's $ 500 liability limit to the period of the voyage covered by the Harter Act. In that case, the Eleventh Circuit declined to apply COGSA's $ 500 limitation, even though the parties agreed to extend COGSA's provisions to the portion of the voyage before loading and after discharge. The plaintiff in Philip Morris alleged that the carrier failed to deliver its cargo to a fit wharf. The Eleventh Circuit ruled: "Because the cargo was not properly delivered to a fit wharf, the Harter Act, not the limitation provisions contained in the bills of lading, controls the question of liability." *Id. at 567.* In so holding, the court did not explain precisely what provisions of the Harter Act took precedence over the limitation provisions in the bill of lading. Nor did the court examine whether COGSA's liability limit was inconsistent with the Harter Act, as we must under the law of our circuit. See *Uncle Ben's, 855 F.2d at 217.*

It would be wrong to read Philip Morris as flatly prohibiting parties from contractually extending COGSA's $ 500 liability limit to the period covered by the Harter Act. Such a reading not only would be out of step with the precedent we have detailed above, but would be inconsistent with the rest of the Eleventh Circuit's opinion in Philip Morris. Although the Philip Morris court acknowledged that "the Harter Act applies to those extended periods of time before and after the loading of the cargo on and off the vessel," id. at 566, it then reaffirmed the well-settled principle that "parties may agree to extend the COGSA limitation provisions to cover the entire period of time in which the carrier has custody of the cargo." Id. This language bolsters the proposition that a carrier may contractually extend the provisions of COGSA to the period covered by the Harter Act.[12]

Accordingly, we hold that the contractual incorporation of COGSA's $ 500 per-package-or-per-unit limit on liability is not inconsistent with the Harter Act, and is enforceable. The district court erred in holding that the Harter Act prevented the defendants from invoking COGSA's limitation on liability.

C

Finally, the defendants argue that the district court erred in holding that a carrier may never invoke COGSA's $ 500 limit where, as here, it fails to exercise due diligence to make the vessel seaworthy. In response, Sabah again cites Philip Morris. In that case, the Eleventh Circuit wrote: "To permit [the carrier] the benefit of the $ 500 limitation, despite the finding of the district court that [the carrier] failed to exercise due diligence in preventing damage to the cargo, . . . would immunize the carrier from the adverse consequences of the negligent handling of cargo." Id. at 567.

Nothing in the text of COGSA suggests that the $ 500 limit on liability is available only to carriers who exercise due diligence to insure a seaworthy vessel. To the contrary, COGSA provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $ 500 per package . . . or . . . per customary freight unit . . . ." *46 U.S.C. app. § 1304*(5) (emphasis added). Furthermore, to hold that a carrier is never entitled to the $ 500 limitation on liability if it fails to exercise due diligence would render the $ 500 limitation a nullity. Under COGSA, a carrier may not be held liable in the first place unless it fails to exercise due diligence to make the ship seaworthy. See *46 U.S.C. app. § 1304*(1) ("Neither the carrier nor the ship shall be liable for

loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . ."). Indeed, other circuits have applied the $ 500 limit even where the carrier failed to exercise due diligence. See, e.g., *Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser, 507 F.2d 68, 70, 73 (2d Cir. 1974).*

Accordingly, we find that the district court erred in holding that a carrier is barred from invoking COGSA's $ 500 liability limitation whenever it fails to exercise due diligence to provide a seaworthy vessel.

IV

For these reasons, we conclude that the district court erred in refusing to calculate damages pursuant to COGSA's $ 500-per-package-or-per-unit limit on liability. See *46 U.S.C. app. § 1304*(5). We decline to address the issues raised in Sabah's cross-appeal regarding the mitigation and foreseeability of certain damages. The record does not suggest that we must resolve these issues in order for the district court to calculate damages under COGSA's $ 500 liability limitation.[13] Accordingly, we REVERSE and REMAND for proceedings not inconsistent with this opinion.

----------Footnotes----------

[1] In its brief, L&C also argues that it could not be held liable under either COGSA or the Harter Act because it was not a carrier. At oral argument, however, L&C withdrew this argument, stating that it does not contest its carrier liability.

[2] IMB and Intermarine further contend that they are carriers under the test set forth in *Zima Corp. v. M. V. Roman*

Pazinski, 493 F. Supp. 268 (S.D.N.Y. 1980). Zima advises us to consider four factors in assessing whether a party is a carrier under COGSA: (1) how the party's obligation is expressed in the documents pertaining to the agreement, (2) the history of dealings between the parties, (3) whether the party issued a bill of lading, and (4) how the party charged the shipper. See *id. at 273.*

Our court has yet to apply anything resembling the Zima test, opting instead to follow the plain language of COGSA. See, e.g., *Pacific Employers, 767 F.2d at 234.* We note, however, that applying the factors articulated in Zima would only bolster our conclusion that IMB and its agent Intermarine were carriers under COGSA. IMB is listed as the "carrier" on the bill of lading and the booking notes.

[3] IMB issued the bill of lading. IMB charged Sabah a fixed amount for carrying its cargo, which is typical for a carrier; it did not bill Sabah for the actual cost of shipment plus a fee for its own services, which is typical for a forwarder. See *Zima, 493 F. Supp. at 273.*

[4] The district court made no finding as to whether IMB and Intermarine are estopped from contesting that they acted as forwarders.

[5] A literal application of Clause 6 seems to make IMB and Intermarine forwarding agents under these circumstances. The cargo's ultimate destination (Labuan) was "other than" the Harbel Tapper's port of discharge (Singapore). Even so, Sabah fails to explain how such a provision could override Congress' intent to have COGSA apply to all parties who "enter into a contract of carriage with a shipper." *46 U.S.C. app. § 1301*(a). The fact remains that IMB and Intermarine entered

into such an agreement with Sabah, and whether Clause 6 purports to make IMB and Intermarine forwarders under certain circumstances does not alter that fact. In general, contractual terms alone cannot grant parties a certain legal status contrary to governing federal law. See *Morey v. Western Am. Specialized Transp. Servs., Inc., 968 F.2d 494, 498 n.5 (5th Cir. 1992)* (holding that the contractual designation of truckers as "independent contractors" is "not determinative" in light of federal regulations to the contrary).

[6] The defendants also contend that the incident did not truly arise "after discharge" and outside the statutory purview of COGSA. They contend that this case is covered by COGSA because Sabah's claim stems from the defendants' breach of their COGSA duty to properly discharge the cargo. See *46 U.S.C. app. § 1303*(2) ("The carrier shall properly and carefully . . . discharge the goods carried."). However, we need not reach this argument in order to dispose of the issue before us.

[7] Some of these cases specifically address the contractual incorporation of COGSA's $ 500 liability limit. See *Mori Seiki, 990 F.2d at 447-48; Baker Oil Tools, 562 F.2d at 940 n.3.* 6]

[8] Our opinion in Baker Oil Tools, although it does not specifically address § § 1 and 2 of the Harter Act, suggests that the Harter Act itself allows the contractual incorporation of COGSA. We wrote: "By virtue of the Harter Act, which governs the pre-loading phase of the carrier's responsibility to the shipper, the parties may agree to extend COGSA's package limitation provision to cover the time when the goods are in the carrier's possession prior to loading." *Baker Oil Tools, 562 F.2d at 940 n.3* (emphasis added) (citations omitted).

[9] Applying this test, we concluded that the contractual incorporation of COGSA's one-year statute of limitation was not inconsistent with the Harter Act. See *Uncle Ben's, 855 F.2d at 217.*

[10] Another Second Circuit case, which examined whether a bill of lading provision was valid under the Harter Act, stated: "If [the carrier] had said simply that liability before loading or after discharge would be limited to $ 500 per container unless a higher valuation were declared and a higher rate paid, such a stipulation would have effectively limited its liability for the loss that here occurred." *Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 816 (2d Cir. 1971).*

[11] Admittedly, this statement is dicta, because the Supreme Court found that the provision at issue in Ansaldo did not merely limit the carrier's liability to an agreed valuation, but rather completely exonerated the carrier with respect to certain types of cargo. See *Ansaldo, 294 U.S. at 499, 55 S. Ct. at 485.*

[12] It is unclear how this language can be reconciled with the Philip Morris court's conclusion that the carrier was not entitled to COGSA's $ 500 limit on liability. We are not bound by the precedent in the Eleventh Circuit, however, and hence we need not resolve this apparent inconsistency.

[13] We also decline the defendants' invitation to calculate, on appeal, the precise amount of damages due under *46 U.S.C. § 1304*(5). Such a determination may require further findings of fact, which an appellate court cannot make.

CIVIL ACTION NO. G-95-046 Non-Jury; FRCP Rule 9(h)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
GALVESTON DIVISION

SABAH SHIPYARD SDN. BHD.,
Plaintiff,

vs.

M/V HARBEL TAPPER, in rem; L&C III, LTD.; INDUSTRIAL MARITIME CARRIERS (BAHAMAS), INC.; ROHDE & LIESENFELD, INC.; ROHDE & LIESENFELD PTE., LTD.; ROHDE & LIESENFELD SDN. BHD.; WINDROSE LINE; INTERMARINE INCORPORATED; PROGRESSIVE ASSURANCE SDN. BHD; AND MALAYSIAN ASSURANCE ALLIANCE BHD.,
Defendants.

October 31, 1997, Decided

October 31, 1997, Entered

COUNSEL:
For SABAH SHIPYARD SDN. BHD., plaintiff: William Carl Bullard, Mark L Walters, Baker and Botts, Houston, TX.

For SABAH SHIPYARD SDN. BHD., plaintiff: Alfred E Yudes, Jr, Watson Farley & Williams, New York, NY.

For L&C III LTD., defendant: Kevin Patrick Walters, Dimitri P Georgantas, Georgantas and Walters, Houston, TX.

For INDUSTRIAL MARITIME CARRIERS (BAHAMAS) INC, INTERMARINE INCORPORATED, defendants: Machale A Miller, O'Neil Eichin Miller and Breckinridge, Michael D Sledge, O'Neil Eichin Miller et al, New Orleans, LA.

For ROHDE & LIESENFELD INC., WINDROSE LINE, defendants: James Richard Watkins, Royston Rayzor et al, Galveston, TX.

For ROHDE & LIESENFELD INC., defendant: Gus A Schill, Jr, Royston Rayzor et al, Houston, TX.

For WINDROSE LINE, defendant: Ted C Litton, Royston Rayzor Vickery and Williams, Houston, TX.

For L&C III LTD., cross-claimant: Kevin Patrick Walters, Dimitri P Georgantas, Georgantas and Walters, Houston, TX.

For ROHDE & LIESENFELD INC., cross-claimant: James Richard Watkins, Royston Rayzor et al, Galveston, TX.

For ROHDE & LIESENFELD INC., cross-claimant: Gus A Schill, Jr, Royston Rayzor et al, Houston, TX.

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For L&C III LTD., cross-defendant: Kevin Patrick Walters, Dimitri P Georgantas, Georgantas and Walters, Houston, TX.

JUDGES:
SAMUEL B. KENT, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
SAMUEL B. KENT

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried before the Honorable Samuel B. Kent, judge presiding, without benefit of a jury, pursuant to F.R.C.P. Rule 9(h), during August 25-27, 1997. Having considered all testimony and evidence therein presented, as well as voluminous post-trial submissions, and based upon a preponderance of the evidence, the Court hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. PARTIES.

1. Plaintiff Sabah Shipyard Sdn. Bhd. ("Sabah") is a shipyard located in Labuan, Malaysia. In 1993, Sabah purchased a W501D5 econopac, an electrical power generating plant, from Westinghouse Electrical Corporation (Trial Exhibit 20) to be used on a barge-mounted power generating plant to produce and sell electricity to the National Power Corporation of the Philippines ("Napocor"). (Trial Exhibit 19). Sabah had to give Napocor various performance guarantees including the "heat rate," i.e., amount of fuel consumed for a given electrical output. The engine portion of the power generating plant was a W501D5 gas turbine. (Trial Exhibit 20).

2. Defendant Intermarine Inc. ("Intermarine"), located in New Orleans, Louisiana, was the agent for Defendant Industrial

Maritime Carriers (Bahamas), Inc. ("IMB"), the successful bidder for the business of transporting approximately 135 pieces of Westinghouse equipment, including the W501D5 gas turbine, from Houston, Texas to Sabah's facilities in Labuan. (Trial Exhibit 2). IMB was informed that the Napocor project was a "fast track" project and that time was of the essence in delivery of the Westinghouse equipment.

3. L&C III, Ltd. was at all relevant times the owner of M/V HARBEL TAPPER. IMB was the time charterer of the HARBEL TAPPER. (Trial Exhibit 39).

4. On or about December 16-17, 1993, Sabah's Westinghouse equipment was loaded on HARBEL TAPPER in Houston, Texas. (Trial Exhibits 210 and 356). Sabah was not informed of the possibility of transshipment from the HARBEL TAPPER at the time the vessel loaded. (Trial Exhibit 38). The vessel sailed from Houston on or about December 18, 1993. (Trial Exhibits 210 and 356).

II. AGREEMENTS.

5. The agreement Sabah signed in regard to the transportation of the Westinghouse equipment was a CONLINE booking note dated December 10, 1993 with Sabah's forwarding agent, Rohde & Liesenfeld Pte. Ltd., through its unincorporated division, Windrose Line, for carriage onboard M/V SIMON BOLIVAR or substitute from Houston, Texas to "Sabah Shipyard Labuan (via Singapore)." (Trial Exhibit 1).

6. IMB executed a similar booking note with Windrose Line which was not copied to Sabah. (Trial Exhibit 2). The IMB CONLINE booking note with Windrose Line contained the express clause that, "when the ultimate destination at which

the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge the Carrier acts as Forwarding Agent only." (CONLINE booking note Clause 6; see Trial Exhibits 1 and 10 for full text of CONLINE clauses).

7. No bill of lading was ever issued to Sabah concerning the shipment from Houston to Labuan, or any part of that shipment, and IMB acknowledges that it authorized delivery of the cargo in Labuan and in Singapore without production of an original bill of lading. (Trial Exhibit 332).

8. IMB caused a bill of lading dated December 18, 1993 to be issued for cargo loaded onboard HARBEL TAPPER. (Trial Exhibit 10). This bill of lading was signed on behalf of the Master and specified port of loading Houston, port of discharge Singapore and "place of delivery by oncarrier Labuan," and covered 135 packages, including the gas turbine and related equipment at issue in this litigation. This bill of lading also contains CONLINE Clause 6 as quoted above. This bill of lading was never provided to Sabah. This bill of lading was issued to Rohde & Liesenfeld on January 31, 1994. (Trial Exhibits 10 and 219).

9. Windrose Line also prepared a bill of lading for carriage on board HARBEL TAPPER from Houston with port of discharge Singapore and place of delivery by oncarrier Labuan for the same 135 pieces of Westinghouse equipment, including the gas turbine and related equipment. (Trial Exhibit 11). This bill of lading was never issued to Sabah.

10. IMB additionally prepared and forwarded to its agents in Singapore and Malaysia two other bills of lading, one showing carriage from Houston to Labuan of four packages, the gas turbine and three packages of related equipment, that

were off-loaded in Singapore (Trial Exhibit 4), and another showing 135 pieces of Westinghouse equipment to be carried on HARBEL TAPPER from the port of loading Houston to port of discharge Labuan. (Trial Exhibit 5). Neither of these bills of lading mentioned discharge in Singapore, or oncarriage to Labuan. Again, Sabah was never provided with copies of either of these bills of lading.

11. HARBEL TAPPER was not the first vessel designated to carry the Westinghouse equipment from Houston to Labuan. First, on or about December 2, 1993, IMB proposed carriage onboard VAST JOLLITY, and Sabah acknowledged confirmation of this booking with Rohde & Liesenfeld on or about December 3, 1993. (Trial Exhibit 28). When this proposal was made, it was not indicated that there would be any transshipment from VAST JOLLITY. However, on or about December 6, 1993, allegedly due to the draft of the VAST JOLLITY and draft restrictions at Sabah's pier in Labuan, Sabah was informed it might be necessary to transship the cargo from VAST JOLLITY. (Trial Exhibit 32).

12. On or about December 7, 1993, IMB substituted SIMON BOLIVAR for VAST JOLLITY, which was unavailable on the dates for loading the cargo. At this time, it was not indicated that there would be any need to transship from the SIMON BOLIVAR. (Trial Exhibit 33). Subsequently, on or about December 9, 1993, Intermarine informed Rohde & Liesenfeld that it reserved the right to transship the cargo from the SIMON BOLIVAR. (Trial Exhibit 35).

13. On or about December 13, 1993, Sabah signed the booking note with Rohde & Liesenfeld's division, Windrose Line, for carriage on SIMON BOLIVAR (Trial Exhibit 1).

14. On or about December 16, 1993, IMB substituted HARBEL TAPPER for the SIMON BOLIVAR and began loading that day in Houston, Texas. (Trial Exhibit 37). Sabah did not learn of the substitution until December 17, after the vessel had commenced loading. (Trial Exhibit 38). HARBEL TAPPER, which was owned by L&C III Ltd. and chartered by IMB (Trial Exhibit 39), sailed from Houston on December 18, 1993. (Trial Exhibit 356). At the time the vessel departed Houston, Sabah was not informed of any need to transship from HARBEL TAPPER nor that its Westinghouse equipment would be offloaded onto a barge in Singapore.

15. On or about January 20, 1994, Sabah was informed that the vessel would first call in Singapore to transship cargo, but was not told how much cargo would be transshipped in Singapore and was never told before the casualty at issue herein that the cargo would be offloaded to a barge. (Trial Exhibit 45).

16. IMB unilaterally made the decision to offload four "heavy lift" pieces of Westinghouse equipment in Singapore and to transship these to Labuan. IMB first planned to use its own vessel, the ASTRALIFT, to transship the heavy lift pieces, but upon learning that this vessel would be delayed in drydock, made the decision to transship the heavy lift equipment on an unrelated vessel, M/V GRIETJE. (Trial Exhibit 48).

III. INTERRUPTION OF THE VOYAGE IN SINGAPORE.

17. Prior to HARBEL TAPPER's arrival in Singapore, IMB realized that it could not use the ASTRALIFT and made arrangements for the carriage of the heavy lift pieces, including the gas turbine, on board M/V GRIETJE. IMB's agent in Singapore, Hiap Woon Pte. Ltd. ("Hiap Woon"), reported to

IMB that the cargo could be discharged to either the wharf or a barge to await transshipment. (Trial Exhibits 52 and 53). If there were a short delay in Singapore, storage charges for barge discharge would be less than if the cargo were discharged to a wharf. (Trial Exhibit 55). IMB instructed its agent Hiap Woon to discharge to a barge, and gave the agent the responsibility to obtain a suitable barge. Id.

18. Hiap Woon obtained a quote from a barge supplier who quoted providing a 120-foot "SC" barge at $ 800.00 per day. (Trial Exhibit 49). An "SC" designation in Singapore indicated that the barge was licensed to carry cargo. (Trial Exhibits 80, 81 and 82). However, on February 1, 1994, when HARBEL TAPPER arrived in Singapore, Hiap Woon instead accepted a smaller 100 foot (30 meter) barge, the ASIA MARINER 5, which was an "SR" barge. (Trial Exhibit 148, pp. 75, 99-100). An "SR" barge is not licensed by Singapore authorities to carry cargo. (Trial Exhibits 80, 81 and 82).
19. On February 1, 1994, HARBEL TAPPER arrived in Singapore (Trial Exhibit 356) and discharged the four pieces of heavy lift cargo to ASIA MARINER 5, which was then towed to Tuas Basin in Singapore. It is not disputed that the barge was never surveyed for suitability for storage for this or any other cargo; no on-hire survey on the barge was performed. (Trial Exhibit 81). The turbine weighing 150 tons and three other heavy lift cases of Westinghouse equipment were off loaded from HARBEL TAPPER onto the barge ASIA MARINER 5. The photographs of the discharge demonstrate the cargo barely fit on the deck of the barge, which was clearly inadequate and unseaworthy. (Trial Exhibits 57-61). ASIA MARINER 5 was much less expensive than the 120-foot barge, and IMB was charged only $ 300 a day. (Trial Exhibit 68). The barge ASIA MARINER 5 was unseaworthy at the time the cargo was discharged to the barge, as

determined by three surveyors in Singapore and by defendant IMB's expert in this litigation. (Trial Exhibits 80, 81, 82 and 155).

20. The barge was unseaworthy in that: (1) the barge was not licensed to carry cargo; (2) the barge was in an extremely poor condition, and (3) the barge was too small for the Westinghouse equipment loaded on board. (Trial Exhibits 80, 81 and 82). Additionally, at the trial counsel for Intermarine and IMB conceded the barge ASIA MARINER 5 was unseaworthy.

21. No watchmen or guards were posted on the barge. (Trial Exhibit 81). On the morning of February 2, 1994, it was discovered that during the night the barge had taken on water, developed a list, and the turbine and two of the three cases of equipment slid off the barge into Singapore harbor and settled on the seabed in salt water ten meters deep. Id. As the gas turbine slid off the ASIA MARINER 5, it struck the side of the barge moored next to ASIA MARINER 5 and holed it. (Trial Exhibits 80, 81 and 82). Although salvage operations commenced on February 2, 1994, the turbine was not removed from the water until February 6, 1994. Id. The turbine could not be lifted from the seabed by all four of its manufacturer-recommended lifting points, but was instead lifted vertically by two of the lifting points. Id. The method of lifting the turbine likely caused internal damage to the turbine. (Trial Exhibit 79, p. 3).

22. After the turbine was removed from the water, it was washed down with salt water, followed by a fresh water wash at the yard of the salvor, Semco. The turbine was then stored at the Semco yard until it was auctioned in December, 1994.

IV. POST CASUALTY.

23. Shortly after the casualty, IMB informed Sabah that it acted as Forwarding Agent, not as a carrier, in regard to the transshipment of the heavy lift equipment in Singapore (Trial Exhibit 84).

24. Immediately after the casualty, Sabah contacted Westinghouse and shortly thereafter an independent turbine expert, William McCall, to determine what should be done with the damaged gas turbine. Both Westinghouse and Mr. McCall stated that the turbine could not be repaired. (Trial Exhibits 71, 73, 74, 76 and 78). Both advised Sabah that irreversible damage had been incurred by the turbine, repairs could not be economically effected and there was nothing that Sabah could do to ameliorate the effects of the mechanical damage to the turbine and its immersion in salt water. (Trial Exhibits 76 and 78). As stressed by both Westinghouse and Mr. McCall, operating the unit after it had been exposed to such a hazardous environment would be risky and possibly life-threatening. Id. However, the turbine was not promptly disassembled and the Court finds that aggressive cleaning, inspection, preservation and parts marketing would have much more substantially mitigated Plaintiff's loss. (Slater trial testimony).

25. Westinghouse informed Sabah that there were no facilities in Singapore, nor for that matter anywhere other than the Westinghouse facilities in Houston, that had the equipment and expertise necessary to disassemble and inspect the turbine thoroughly. (Trial Exhibit 74). The Court finds this unpersuasive. If immersed in fresh water with an elevated pH, corrosion would have been arrested. This would have bought time for much more comprehensive cleaning, inspection and

repairs. This could have been done in facilities available in Singapore. (Slater trial testimony).

26. Shortly after the casualty, John Cummings of Sabah contacted Mike Craigie at Van Der Horst in Singapore concerning repair of the turbine. Craigie informed Cummings that the facilities needed for the repair of the turbine were not available in Singapore. (Cummings Trial Testimony). Again, the Court disagrees.

27. Westinghouse would not warrant the condition or performance of the turbine if it were refurbished. (Trial Exhibit 76). Therefore, the Court finds replacement, rather than repair, was economically justified.

28. In March 1994, Westinghouse estimated the value of the salvageable parts of the turbine at US $ 1.5 million. Mr. McCall estimated the value of salvageable parts of the turbine and related equipment at US $ 2 million. Mr. McCall's estimates were based upon contemporaneous sales he had made of similar used parts for a W501B Westinghouse gas turbine, a sister to the W501D5 gas turbine at issue in this litigation. No other valuations were received by Sabah until the 1997 estimates by defendants' expert, Mr. Wilson, in this litigation. He opined values of up to US $ 9.9 million. The totality of the evidence supports the value of the salvageable parts at US $ 6 million, and the Court so finds.

29. The turbine was auctioned in Singapore in December 1994. (Trial Exhibit 153). The auction was well attended, with over twenty persons in the gas turbine industry present. (Trial Exhibit 153, p. 23, lines 3-5). Despite this attendance, the Sabah representative was the only bidder and took the turbine for $ 100,000.

30. In 1995, Westinghouse gave Sabah a $ 2 million credit on the purchase of a gas turbine from Westinghouse in return for Sabah surrendering the damaged turbine to Westinghouse. (Trial Exhibit 142, p. 17).

V. DAMAGES.

31. Sabah's damages are as follows:

TURBINE REPLACEMENT COSTS

Cost of Replacement Turbine, mechanical package, pipe rack (less cost of naphtha fuel skid, start-up equipment, and fuel oil heat tracing) (Trial Exhibits 99-101)	$ 13,090,245.00
Shipping Replacement Turbine (Trial Exhibit 106)	306,354.71
Insurance for Shipment of Replacement Turbine (Trial Exhibit 106)	42,800.14
Case No 16 - left in Singapore by IMB; one-half transport cost Singapore to Labuan (Trial Exhibits 111, 118 and 119)	52,371.70
Salvage Costs (Trial Exhibit 113)	32,495.58
Storage cost (until auction) (Singapore	$ 90,214.00
at exchange rate of 1.513)	59,625.90
Auction costs and fees	100,793.94
Sub-Total	$ 13,684,686.97

Less reasonable mitigation	($ 6,000,000.00
TOTAL	$ 7,684,686.97
PLUS interest @ at 5.0% simple interest, per annum, 45 months from February 1, 1994 to Nov. 1, 1997	1,440,878.81
GRAND TOTAL	$ 9,125,565.78

32. While IMB admits it knew the gas turbine and related Westinghouse equipment were needed for a "fast track" Sabah project in the Philippines, there is insufficient evidence in the Record to justify an assessment against IMB for the delay damages incurred by Sabah under the Philippine contract, as such did not foreseeably arise out of the loss of this cargo. The Court finds no damages for this alleged loss.

33. Bank charges incurred to purchase the replacement turbine were as follows (all numbers in U.S. dollars):

60 day interest	$ 96,272.5
Bank acceptance charges	22,131.6
Transit charges (finance)	33,622.0
Advising/Negotiating bank charges	20,347.4
Letter of credit charges	28,010.4
Wing Tiek 2% finance charge	280,265.5
Total	$ 480,649.5

(Exhibit Nos. 102, 103, 104, 107, 108)

These financing charges were incurred because Sabah did not have sufficient funds to purchase a second turbine, the replacement turbine, and was forced to rely upon the credit of its materials supplier, Wing Tiek. However, there is no showing in the Record that such costs were foreseeable and the Court finds that 5.00% per annum simple interest, for past

loss, is adequate compensation as set out in Finding No. 31, supra.

34. Damages specified in Finding No. 31, supra, are jointly and severally assessed against Defendants IMB, Intermarine and the vessel owner L&C III, Ltd.

CONCLUSIONS OF LAW

1. Industrial Maritime Carriers (Bahamas) Inc. ("IMB") and Intermarine, Inc. ("Intermarine") are liable for the damages to the cargo at issue as freight forwarders or "forwarding agents" for negligence in that: (i) IMB and Intermarine stowed the cargo on an obviously unseaworthy barge; (ii) IMB and Intermarine took no measures to determine if the barge was seaworthy; (iii) IMB and Intermarine stowed the cargo on a barge that was too small for the cargo; and (iv) IMB and Intermarine stowed the cargo on a barge that was not licensed for the carriage of cargo.

2. Freight forwarders may not limit their liability under COGSA, and may not take refuge in COGSA's $ 500 per package limit. Hoffman-LaRoche, Inc. v. M/V *JEFFERSON, 731* F. Supp. 109, 110-11 (S.D.N.Y. 1990) (COGSA, by its terms, is applicable only to carriers and not to freight forwarders).

3. In the alternative, IMB and Intermarine, as well as L&C III, Ltd., are liable for damages to the cargo at issue as carriers under the Harter Act after the cargo was discharged from HARBEL TAPPER, awaiting transshipment for delivery to consignee Sabah in Labuan.

4. The Harter Act applies to the carriage of cargo from a U.S. port to a foreign port (i) while the cargo is in the custody of the carrier and prior to loading on the vessel, and (ii) after the discharge of the cargo from the vessel and prior to the delivery of the cargo to the consignee. *46 U.S.C. § § 190*-196; *46 U.S.C. § 1311.*

5. Under the Harter Act, a carrier has an obligation to care for the cargo until it is delivered to the consignee. *Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 723* (2d Cir.), cert. denied sub nom., *American Export Lines, Inc. v. Caterpillar Overseas, S.A., 375 U.S. 942, 84 S. Ct. 347, 11 L. Ed. 2d 272 (1963); United States v. Ultramar Shipping Co., 685 F. Supp. 887, 896 (S.D.N.Y. 1987),* aff'd, *854 F.2d 1315 (2d Cir. 1988); Central Trading Corp. v. M/V "DONG MYUNG", 361 F. Supp. 302, 304 (S.D.N.Y. 1973).*

6. There is no package limit under the Harter Act, and a carrier may not limit its liability under the Harter Act for damages caused by its breach of its duty to care for and properly deliver the cargo. *46 U.S.C. § § 190*-191; *Ultramar, 685 F. Supp. at 896; Morris v. American Shipping Co., Inc., 748 F.2d 563, 566-67 (11th Cir. 1984).*

7. L&C III, Ltd. is liable for the damage to the above cargo as carrier under the Harter Act. L&C III, Ltd. had an obligation to "carefully handle and stow her cargo and to care for and properly deliver same." *46 U.S.C. § 191.* L&C failed to fulfill this obligation by discharging the cargo to an unsuitable and unseaworthy barge. *Ultramar, 685 F. Supp. at 897.* Under the Harter Act, a carrier may not limit its liability for damages caused by a breach of its duty to care for the cargo. *F.J. Walker Ltd. v. Motor Vessel Lemoncore, 561 F.2d 1138, 1142-43 (5th Cir. 1977); Morris, 748 F.2d at 566-67.*

Therefore, L&C may not claim the protection of any package limitation.

8. In the alternative, as carriers, IMB and Intermarine negligently discharged the cargo to the unseaworthy and unsuitable barge. The barge was unseaworthy at the time of the commencement of its voyage, and IMB and Intermarine failed to exercise due diligence to provide a seaworthy barge.

9. Even assuming COGSA applied, which the Court concludes to the contrary, a carrier may not limit its liability to the $ 500 COGSA package limitation where the carrier fails to exercise due diligence to provide a seaworthy vessel. *Walker v. Harris, 335 F.2d 185, 197* (5th Cir.), cert. denied, *379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342 (1964); Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania De Vapores, S.A., 388 F.2d 434* (2nd Cir.), cert. denied, *393 U.S. 828, 89 S. Ct. 92, 21 L. Ed. 2d 99 (1968).*

10. The Court concludes that each and all of the Defendants, jointly and severally, are liable to Plaintiff in the amount of $ 7,684,686.97, together with pre-Judgment interest of $ 1,440,878.81, for a total of $ 9,125,565.78, and Judgment is hereby rendered in like amount.

11. In the event any Finding of Fact constitutes a Conclusion of Law, it is adopted as such. In the event any Conclusion of Law constitutes a Finding of Fact, it is adopted as such.

IT IS SO ORDERED.

DONE at Galveston, Texas, this the 31st day of October, 1997.

SAMUEL B. KENT

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

This cause came on to be heard for trial before the Honorable Samuel B. Kent, judge presiding, without a jury, during a three-day trial, held August 25-August 27, 1997. Plaintiff Sabah Shipyard Sdn. Bhd. appeared through its attorneys Watson, Farley and Williams and Baker & Botts, L.L.P., Defendant L & C III, Ltd. appeared through its attorneys Filteau, Sullivan and Georgantas, and Defendants Intermarine, Inc. and Industrial Maritime Carriers (Bahamas) Inc. appeared through their attorneys O'Neil, Eichin, Miller, Saporito & Harris. The parties thereafter timely filed numerous and extensive post-trial briefs, response briefs and reply briefs, and the issues having been duly tried, and the Court after considering all of the evidence and testimony, and after due deliberation having made and filed Findings of Fact and Conclusions of Law in writing on the 31st day of October, 1997, in favor of the Plaintiff, and jointly and severally against each and all of the Defendants, and directing the entry of Judgment thereon,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. Defendants L & C III, Ltd., Industrial Maritime Carriers (Bahamas), Inc., and Intermarine, Inc. are jointly and severally liable in the amount of $ 7,684,686.97, together with pre-Judgment interest in the amount of $ 1,440,878.81, together totalling $ 9,125,565.78, under the Harter Act for damages to the cargo of Plaintiff Sabah Shipyard Sdn. Bhd.;

2. Post-Judgment interest on the above amounts shall run from November 1, 1997 to the date of payment of such amounts and shall be computed at the rate of 6.00% per annum, simple interest. In the event said Judgment is not timely paid, let execution issue, as provided by law.

IT IS SO ORDERED. THIS IS A FINAL JUDGMENT. ALL RELIEF NOT HEREIN EXPRESSLY GRANTED IS DENIED.

DONE at Galveston, Texas, this the 31st day of October, 1997.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

No. 97-41417, NO. 98-40104

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SABAH SHIPYARD SDN BHD,
Plaintiff - Appellee-Cross-Appellant

v.

M/V HARBEL TAPPER, IN REM; L & C III LTD; INDUSTRIAL MARITIME CARRIERS (BAHAMAS), INC; INTERMARINE INCORPORATED,
Defendants - Appellants-Cross-Appellees-Appellees;

SABAH SHIPYARD SDN BHD,
Plaintiff - Appellant

v.

M/V HARBEL TAPPER; L & C III LTD; INDUSTRIAL MARITIME CARRIES (BAHAMAS) INCORPORATED; ROHDE & LIESENFELD INC; WINDROSE LINE; INTERMARINE INCORPORATED,
Defendants - Appellees

July 28, 1999, Filed

JUDGES:

Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY:

Emilio M. Garza

OPINION:

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge